***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

75-1136

# United States Court of Appeals

**For the Second Circuit.**

THE UNITED STATES OF AMERICA,

Appellee,

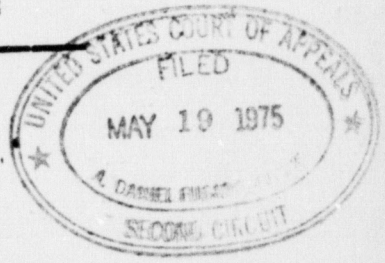
-against-

THOMAS B. MURPHY,

Defendant-Appellant.

*On Appeal from Order of the United States Court for the Eastern District of New York*

# Appellant's Brief

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Appellee,

- against -

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STATEMENT:

Appeal is taken from a judgment of conviction made and entered April 4, 1975. Honorable Jacob Michler sentenced appellant to a term of imprisonment of fifteen (15) years and five (5) years to run concurrently, upon his conviction of violation of Title 18 U.S.C. Section 4208 (a)(2); armed bank robbery and conspiracy to commit the same. Said judgment was pursuant to a verdict rendered by a jury.

The issues presented to this Court are:

1. Could a conviction be based on identification of a four year old duplicate "mug shot" where all the witnesses to the bank robbery are unable to make a Court identification?

2. Did testimony of speculative and tangential matter which was only remotely relevant and of prejudicial character, unfairly preclude a fair determination of guilt or innocence?

## THE FACTS:

### HEARING - IDENTIFICATION AND VOLUNTARINESS OF STATEMENTS

When called upon to identify appellant none of the witnesses, employees of the Chase Manhattan Bank, were able to make a Court identification of appellant as one of the perpetrators of a bank robbery which occurred on May 9, 1974. (H12, 13, 44, 45, 59, 60, 70, 99, 135, 136, 175, 188).* Two bank tellers Lottie Hoggard and Alice DeChiara and the bank guard Joseph Leater selected a"mug shot" of appellant taken December 1970. (117, 118, 137, 191, 192). This selection was based on a glance of a second or two by Ms. Hoggard, a half minute viewing by Ms. DeChiara and a three to four second viewing by Mr. Leater of a mustachio man of medium build with long dark hair who was covered by a handkerchief except for the few times he discarded it while attending to the money. (92-95, 102, 129, 142, 188-191, 196). None of the witnesses would venture an opinion stronger than that the photograph they selected resembled the shorter bank robber or most resembled the shorter bank robber (98-100, 137, 191, 192). However, a viewing of appellant in a line-up wearing a false mustache failed to arouse any recognition by these witnesses. (100, 137, 216). It merely resulted in erroneous selection of an FBI agent who Ms. DeChiara believed to be the shorter of the two bank robbers. (216).

*( ) Refers to minutes of hearing.

To conclude the hearing special agent Stephen M. Carbone's testimony related the arrest of appellant on July 10, 1974, when three FBI agents and two New York City plainclothes detectives raided 91 Marcus Avenue, New Hyde Park armed with a "mug shot" of appellant. Infected with the misidentification syndrom, Agent Carbone at 7:00 A.M. crashed the apartment above appellant's only to withdraw after being told of the mistake. Meanwhile the other members of the raiding party had invaded appellant's apartment and were proceeding to extract statements while searching the apartment. When special agent Carbone finally entered appellant's apartment gun drawn, appellant was busy signing a waiver of rights form supplied to him by special agent Murphy.

Fully informed of his constitutional rights appellant confided in the FBI agents his ownership of a 1965 blue Cadillac; his reluctance to have anyone but he and his wife drive the automobile; his unemployment for at least six (6) months; his most recent employment by O. C. Cab Company; a recent windfall at the race track of $1,800; and two voyages with his wife, one to Hawaii and the other to the Bahamas. Similarly, special agent Carbone testified to certain statements emanating from the co-defendant Widman, after proper advice, that he never was in a 1965 Cadillac or did he know anyone who owned one, including appellant; that he had not travelled to Hawaii; that he was not Robert Hoffman; nor did he rent an apartment at 201-15 Jamaica

Avenue, he lived at 254-12 74th Avenue with his parents. Mr. Widman however did confide in the special agents that he was unemployed for the past year since his last job with O. C. Cab Co. except for occasional jobs as a mechanic. Both appellant and co-defendant denied knowledge or participation in the bank robbery. (248-302).

THE TRIAL:

On May 9, 1974 the Chase Manhattan Bank branch number 113 at 190-02 Jamaica Avenue, Hollis, Queens, a member bank of the Federal Insurance Deposit Corporation, was robbed of $73,594.00. Two men, one tall, light hair, heavy and the other medium build, dark haired, seemed to have entered the bank from out of nowhere. Both were armed and kept their faces hidden under handkerchiefs held by their free hand to their face. All the personnel present in the bank at 8:30 A.M. were rounded up and herded to the safety deposit area of the vault. Mrs. Jonke, Assistant Manager of the bank, tried at first to trip the alarm but was thwarted by the larger of the bank robbers who importuned Mrs. Jonke to open the time vault. However, the vault would not yield even with Mrs. Jonke and another employee throwing the second portion of the combination. (T23-25, 35, 50-53, 69-73, 92-95, 165-168, 246-250, 314, 315).**

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*(  )T refers to the pages of the trial minutes.

Momentarily stymied, the taller bank robber requested the remainder of the money. Mrs. Jonke informed him of the money in the teller's buggys for which each teller had a key. This required the robbers to await the arrival of the tellers before they could accomplish their goal. As each teller arrived the bank guard,accompanied by the taller robber, would let her in and take her to the safety deposit area of the vault. All the bank employees were lined up facing the rear of the vault and each teller was taken out of the vault to open her buggy and then returned. With both hands the shorter bank robber stuffed the money into a sack - discarding his face covering, thereby uncovering a large mustache. It was at that interval that two tellers Alice DeChiara and Lottie Hoggard and the bank guard Joseph Leater were able to get a side glance at the smaller bank robber's face. Ms. DeChiara, Ms. Hoggard and Mr. Leater were shown an array of"mug shots", and they selected the old "mug shot" of appellant from the array. A duplicate of this "mug shot" was cut in half and shown to the jury. (25-34, 52-57, 74-78, 95-117, 51, 168, 173, 251-258).

Each had selected the "mug shot" as resembling the smaller of the bank robbers, selecting certain features as determinative,Mr. Leater and Ms. Hoggard the mustache and size; Ms. DeChiari the eyes which she testified to have been imbedded in her memory from the moment the smaller bank robber appeared in back of her staring into the washroom mirror in the basement of the bank. At a line-up Ms. DeChiara selected FBI agent Lang as the smaller of the bank robbers. Mr. Leater and Ms. Hoggard

were unable to make an identification at the line-up even with appellant's presence in the line-up wearing a false mustache. (110, 116, 171-173, 178, 235, 236, 244, 257, 258-267).

Also unable to identify appellant was Plenio Medina, Manager of Met Food Stores, who worked across the street from the bank. According to Mr. Medina a 1965 Blue Cadillac, license SSF- the numbers were unknown - was parked near his store on May 6th, 7th and 8, 1974 at approximately 7:45 - 8:00 A.M. The reason for Mr. Medina's recollection was a remark by one of the occupants of the auto to one of his female co-workers which occurred on May 6, 1974. On the next day Mr. Medina testified that he observed someone in the auto writing. (285-292).

Alan Loughrin, Credit Manager of the Ili Kai Hotel in Honolulu, Hawaii was presented by the government to show that appellant and a Robert Hoffman of 254-12 74th Avenue, Glen Oaks, Queens, were registered at the hotel from May 13 to May 17th at $26.00 a day and made long distance calls to New York including a call to a telephone number a co-defendant Robert Widman gave to the FBI agents as his. Mr. Loughrin testified that the persons who registered at his hotel paid $78.00 each for the room and rented a safe deposit box. According to a witness from the Civil Aeronautics Board the tickets to Hawaii cost anywhere from $280.00 for a charter flight to $750.00 for a first class flight to Hawaii. (185-206, 348-353).

Special agent Carbone related a surveillance subsequent to appellant's arrest of Robert Widman in the vicinity of a Buick convertible, license number 626QIJ parked at appellant's address, which registration number was found to belong to Mr. Widman's father for a 1968 Cadillac. Another surveillance found appellant and Widman outside of Ray Anchorage Bar with appellant's Cadillac and the same Buick convertible parked nearby in the parking lot, this time bearing license number 683QMN, belonging to Mr. Widman's sister for a 1965 Mercury. Special agent Carbone went on to testify to the arrest of appellant and the statements extracted after the arrest; that appellant was unemployed for at least six (6) months; his last job with O.C. Cab Company; that he took a trip with his wife to Hawaii and another to the Bahamas; that he and his wife were the only drivers of the 1965 Cadillac and that the auto, as far as he knew, was not at 190th Street in Jamaica on May 6th, 7th and 8th. An account of Widman's arrest followed, including Widman's denial of acquaintance with appellant, his 1965 Cadillac or presence at 91 Marcus Avenue, appellant's home; his denial of a trip to Hawaii; his denial of residing at 201-15 Jamaica Avenue; his account of unemployment for a year except for odd jobs as a mechanic; his last employment by O.C. Cab Company; his residence at his parent's home at 254-12 74th Avenue. (208-222, 396, 400, 401, 408, 411).

Three of appellant's neighbors Jerald Goodman, Viola and Gus Kallinikos, testified that sometime in the spring of 1974 appellant cut his hair and removed his mustache. Appellant's mother and brother confirmed this. They put the exact date of the haircut or at least of the mustache removal, prior to Easter Sunday (268-273, 361, 362, 372-375, 382-388, 417-431, 477-479).

Helga Schenk, secretary to a real estate company, interpreted real estate business records and a lease dated April 21, 1975 in the name of Robert and Judy Hoffman previously of 254-12 74th Avenue, Glen Oaks, Mr. Hoffman's mother's address. Ms. Schenk was able to identify the co-defendant Widman as Mr. Hoffman. (277-284).

Several witnesses testified to the co-defendant Robert Widman's good character. John Mullhane and Barbara Princhief who were with the co-defendant at the bar when he was arrested and within listening distance, did not hear Widman advised of his constitutional rights. This was rebutted by special agent Raymond Bernard. (434-445, 451-455, 459, 460).

POINT I

"MUG SHOTS" WHICH WERE PRESENTED TO THE JURY AS THE ONLY MEANS OF IDENTIFICATION, AND UPON WHICH THE GOVERNMENT BUTTRESSED A SUBSTANTIAL PORTION OF ITS CASE WERE IMPROPERLY EXHIBITED TO THE JURY.

Appellant was not identified as one of the bank robbers. A photograph of appellant taken upon his arrest, likewise, was not selected as a likeness of the smaller bank robber. However, a four year old "mug shot" of appellant was selected from among an array of "mug shots" presented to three witnesses who testified that the "mug shot" resembled the smaller of the bank robbers. The prosecutor, during the course of examining these witnesses, handed them "mug shots" of various persons, among which was an unaltered "mug shot" of appellant.

After the first of the witnesses Alice DeChiara had selected appellant's"mug shot", it was altered and cut. The disguised "mug shot" was presented to the jury in two parts - full front face and full profile - missing were the usual identification numbers at the bottom of the"mug shot".

While it might appear that the jury was unaware of the nature of the photos being passed among them, the manner in which the original unaltered "mug shot" of appellant was shown to Alice DeChiara, blatantly and in open view of the jury, could leave no doubt the witness was being shown a "mug shot and the

picture being passed among the jury was some disguised form of that "mug shot". It was only after Ms. DeChiara had identifed the "mug shot" as most resembling appellant that the alterations were made.

Additional testimony by a government witness, Gus Kallinikos, a neighbor of appelant, that in July appellant was sans mustache and had shorter hair precludes any assumption that the "mug shot" was taken at the time appellant was arrested for the present charge in July of 1974. Any jury by the simple process of logic must conclude that the photograph of appellant shown to the jury was a "mug shot" photographed on the occasion of a prior arrest.

Although this process of bringing before the jury appellant's prior criminal record was infinitely more subtle than in U.S. v. Harrington, 490 F. 2d 487, the prejudice by introduction of the photos was equally harmful. That such error resulted from inadvertance does not erase the damage.

> "If, at his trial, a defendant has not taken the witness stand in his own defense, and if he has not himself been responsible for causing the jury to be informed about his previous conviction, he is entitled to have the existence of any prior criminal record concealed from the jury." (P. 490).

It is further put to this Court that the limited opportunity available for the witnesses to observe the shorter robber, their description of what they observed and the criteria for their selection of appellant's "mug shot" created a substantial likelihood of mistaken identification. And the Court by accepting a qualified identification of the "mug shot" of appellant resembling or most resembling the shorter robber was effectively contradicting the testimony of these witnesses that they could not say appellant was the shorter of the bank robbers. See Neil v. Biggers, 409 U.S. 188.

## POINT II

TESTIMONY OF SPECULATIVE MATTER WHICH IF RELEVANT AT ALL WAS OF A LIMITED VALUE IN ASSESSING THE ISSUE OF APPELLANT'S PARTICIPATION IN THE CRIME CHARGED, UNFAIRLY SUBVERTED A FAIR DETERMINATION OF APPELLANT'S GUILT OR INNOCENCE.

Having failed to prove their case by identification testimony, the government resorted to evidence of a highly speculative and prejudicial nature calculated to unfairly prejudice appellant, confuse the issues and mislead the jury. See Proposed Federal Rules of Evidence, Section 403. An innocuous statement by aqpellant of unemployment for six months was paired with a trip to Hawaii four days after the robbery. Another innocent statement attributed to appellant, that only he and his wife drove a 1965 Blue Cadillac registration number SSF511, was

coupled to an observation of a 1965 Blue Cadillac having the same letters as in appellant's registration being present in the vicinity of the bank on three days prior to the robbery. That the co-defendant witness was identified as a passenger in the vehicle and that somebody in the vehicle appeared to be writing further added to this web of speculation. Thus, without having shown any facts that a jury could even infer that appellant was present in the vicinity of the bank, the government has provided the jury with the means to transform suspicion and speculation into guilt. Similarly the testimony of a trip to Hawaii by an unemployed man can be the basis upon which the jury speculated that this trip was financed by the $73,594.00 taken from the Chase Manhattan Bank on May 9, 1974.

Appellant's statements in conjunction with innocent activity were utilized by the government as cross examination, without appellant having taken the stand. Each statement, however remote, was cleverly employed in conjunction with an activity equally tenuous to create an overall impression that had no bearing on any of the issues germain to the trial. Conjecture was added to conjecture creating an overall picture of a desperate man attempting to avoid the consequences of his acts through false and misleading statements indicative of a consciousness of guilt, without an initial showing that appellant had anything to hide.

It is inconceivable that any inference of consciousness of guilt could flow from any of the statements attributed to appellant. Therefore, the Court's charge dealing with consciousness of guilt was entirely inappropriate as applied to appellant and the Court should have so advised the jury. See Barnes v. United States, 412 U.S. 837.

Thus the Court's misapplied charge lent credence to the otherwise attenuated proof of the government and could have only operated to confuse the jury by diverting them from the only issue in the case; appellant's presence at the bank during the robbery on May 9, 1974.

> "(T)he competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth; and that does not inevitably follow from the fact that it is rationally relevant ....(T)he question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and expense it will involve, and by the chance that it will divert the jury from the facts which would control their verdict." (U. S. v. Krulewitch, 145 F. 2d 76, 80.)

See Weinstein's Evidence, United States Rules, Weinstein and Berger, Article IV Relevancy and Its Limits, Rule 401 Et Seq. and McCormick on Evidence, Section 185 (2d Ed. 1972).

CONCLUSION:

THE JUDGMENT OF CONVICTION
SHOULD BE REVERSED.

Respectfully submitted,

HAROLD BORG

JERALD ROSENTHAL
of Counsel on the Brief

STATE OF NEW YORK )
: SS.
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 19 day of May, 1975 deponent served the within Brief upon Ass't Atty.

attonrye(s) for Appellee

in this action, at 225 Cadman Plaza E.
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
19 day of May, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976